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STATE OF MICHIGAN

IN THE SUPREME COURT

In re: ESTATE OF
HERMANN A VON GREIFF

Michigan Supreme Court Case No: 161535
Court of Appeals No: 347254
Probate Court No: 18-34046-DE

REPLY IN SUPPORT OF APPELLANT CARLA VON GREIFF'S APPLICATION FOR LEAVE TO APPEAL

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I. Introduction

The Court of Appeals improperly created a common law exception to MCL 700.2801(2)(e)(i) where no such exception exists in the plain language of that statute. Appellee argues that the Court of Appeals was correct in creating that exception. The premise of Appellee's position is that, by instituting a divorce action, she was insulated from the clear and unambiguous language of Michigan's spousal abandonment statute, MCL 700.2801(2)(e)(i). In support of her position, Appellee offers three erroneous arguments: 1) the panel majority did not rewrite MCL 700.2801(2)(e)(i), 2) the panel majority's opinion aligned with this Court's ruling in *In re Erwin Estate*, 503 Mich 1; 921 NW2d 308 (2018), and 3) the issues before this Court do not warrant judicial review. Each of Appellee's arguments relies upon baseless opinions and mistaken interpretations of the law.

Conversely, Appellant relies upon the unquestionable precedent established by this Court, in addition to the application of the irrefutable facts to the clear and unambiguous language of MCL 700.2801(2)(e)(i). In that regard, the plain language of a statute must be followed. The Court of Appeals may not create a blanket exception to a statute based upon its own notions of fairness or to suit its own public policy preferences; courts interpret statutes, they do not rewrite them. Time and time again, Michigan courts have upheld this established rule of Michigan jurisprudence, which is codified under the Michigan Constitution. Const 1963, art 3 § 2. Yet, contrary to this rule, the panel majority impermissibly circumvented the Legislature, effectively rewriting MCL 700.2801(2)(e)(i) with its decision As correctly noted by the Court of Appeals dissent:

> Under the actual language of the statute, an individual is not a surviving spouse if: (1) for a year or more before decedent's death (2) he or she was willfully absent from the decedent spouse. In contrast, under the majority's reasoning, the statute is rewritten to

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> disinherit a surviving spouse if: (1) for a year or more before decedent's death (2) he or she is willfully absent from the decedent spouse, and (3) he or she is not in the process of obtaining a divorce or annulment from the divorcing spouse.

(Dissent at 5).

To address and correct the erroneous decision of the panel majority, this Court should grant leave to appeal. In the alternative, the Court should peremptorily reverse the decision for the reasons stated in the Court of Appeals' dissenting opinion.

II. In a 2-1 Published Opinion, the Court of Appeals Impermissibly Rewrote MCL 700.2801(2)(e)(i)

In support of her position that the Court of Appeals did not rewrite MCL 700.2801(2)(e)(i), Appellee offers neither legal, nor factual arguments. Instead, she offers her unsupported opinion of what the Legislature "intended" when it enacted that statute. In her brief, Appellee asks the question, "[e]xactly what behavior is intended to be prohibited [by the Legislature through the enactment of MCL 700.2801(2)(e)(i)]?" (Appellee Brief at 7). Appellee answers that question by offering her baseless opinion that divorcing couples were not contemplated by the Legislature when it passed MCL 700.2801(2)(e)(i). The question Appellee poses (and purports to answer) is a question of public policy, and questions of public policy are the province of the Legislature, not the judiciary.

As stated by this Court:

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours--of identifying priorities, weighing the relevant considerations and choosing between competing alternatives--is the Legislature's, not the judiciary's.'

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Van v Zahorik, 460 Mich 320, 327; 597 NW2d 15 (1999) (citations omitted). Appellee simply asks this Court to ignore the well-established rule set forth in *Van* and simply adopt her speculative opinion of the Legislature's intent. Of course, guessing at the Legislature's intent in the face of a clear and unambiguous statute is outside of the scope of the judiciary's function. *Erwin Estate*, 503 Mich at 25 ("Courts should not resort to judicial construction when the words of the Legislature are clear and unambiguous.").

MCL 700.2801(2)(e)(i) sets forth unambiguous criteria to establish when a surviving spouse has been deemed to have abandoned a decedent spouse. Nowhere in that clear and unambiguous statute is there an exception for couples engaged in divorce proceedings at the time of one spouse's passing. Consequently, no such exception can be created by a court. As articulated by this Court:

> …if courts are free to cast aside a plain statute in the name of equity, even in such a tragic case as this, then immeasurable damage will be caused to the separation of powers mandated by our Constitution. Statutes lose their meaning if "an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity." Significantly, such unrestrained use of equity also undermines consistency and predictability for plaintiffs and defendants alike.

Trentadue v Buckler Lawn Sprinkler, 479 Mich 378, 406-407; 738 NW2d 664 (2007) (citations omitted).

This Court just recently enforced this rule of law in another probate dispute, *In re Mardigian Estate*, 502 Mich 154; 917 NW2d 325 (2018). In that case, the drafting attorney of a will, who was unrelated to the testator, was also a beneficiary of that will. Of course, the drafting of a testamentary instrument by an unrelated attorney who will also receive a beneficial interest through that instrument is a violation of the Michigan Rules of Professional Conduct. MRPC 1.8. Despite being presented with strong public policy reasons for voiding that

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instrument, this Court determined that it could not create a blanket rule a will drafted by an unrelated attorney who receives a beneficial interest under that will is void as a matter of law. This Court, consistent with its prior decisions, ruled that, "the issue whether a per se rule of undue influence is appropriate simply boils down, in our judgment, to enacting substantive public policy, which is the responsibility of the Legislature, not this Court." *Mardigian Estate*, 502 Mich at 169.

The reasoning of *Mardigian Estate* applies *a fortiori* to the present action, in which Appellee's public policy arguments are weaker and find less support. Just as in *Mardigian Estate*, Appellee's arguments concerning public policy should have no bearing on this Court's (or any court's) application of the unambiguous terms of MCL 700.2801(2)(e)(i). Appellee does not dispute the fact that she ceased all contact with her husband over a year prior to his death, offering no emotional support and avoiding all physical contact during that period. Consequently, the Court of Appeals was bound to apply the plain language of MCL 700.2801(2)(e)(i) and reach the same conclusion as the probate court: that Appellee is not the surviving spouse of the decedent, Hermann Von Greiff ("Decedent"). The panel majority did not do so, and this Court should grant leave to appeal that decision or, in the alternative, peremptorily reverse for the reasons stated by the Court of Appeals dissent.

III. The Court of Appeals' Majority Opinion Conflicts with this Court's Decision in *In re Erwin Estate*

Appellee argues – without support – that she was not required to make any effort to maintain contact with Decedent, because they were engaged in divorce proceedings at the time of his death. Appellee states in conclusory fashion, "…once Anne began the process of ending her marital relationship legally, the Probate Court was still requiring her to maintain emotional support and contact. The *Erwin* court has said that MCL 700.2801(2)(e) does not so require."

(Appellee Brief at 7). Appellee's analysis of the *Erwin Estate* decision is incorrect. In actuality, this Court found:

> an individual is not a surviving spouse for purposes of MCL 700.2801(2)(e)(i) if he or she intended to be both physically and emotionally absent for the year or more leading up to the deceased spouse's passing.

Erwin Estate, 503 Mich at 20. While this Court stated there was no requirement of a *continuous* effort by a surviving spouse to maintain contact, it certainly required *some* effort in order for spouse to be insulated from MCL 700.2801(2)(e)(i). *Erwin Estate*, 503 Mich at 16-17 (noting that a surviving spouse need only, "maintain an element of emotional support and contact" to avoid a claim for abandonment under MCL 700.2801(2)(e)(i)).

Had Appellee made some minimal effort towards contact in the 13 months preceding Decedent's death, this case would not have proceeded. However, Appellee testified that she made no such efforts, *to wit*:

> Q. So based on your testimony, you had no physical contact with [Decedent] after May 18, 2017 and offered no emotional support to him after May 31, 2017, correct?
> A. Correct.

(8/21/18 Transcript at p 13). Appellee further testified:

> Q. … we've now reviewed a Complaint for Divorce, an Ex Parte Order, and a Reply, all filed on your behalf in the divorce action asking that—where you ask that you have exclusive use of the marital home. To the exclusion of [Decedent]. You have testified that you no longer wanted to live with [Decedent]. Is it fair to say that you had no intention of returning to this marriage?
> A. Correct.

(8/21/18 Transcript at p 29). Appellee continued:

> Q. … You [and Decedent], for all intents and purposes, lived as a divorced couple beginning May 18th; separate and apart. Wouldn't you agree?
> A. I guess so.

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(11/7/18 Morning Transcript at p 132).

Ultimately, the Court of Appeals must follow the precedent established by this Court. *State Treasurer v Sprague*, 284 Mich App 235, 242; 772 NW2d 452 (2009). In creating its common law exception to MCL 700.2801(2)(e)(i), the panel majority disregarded this Court's binding precedent, which stated clearly that *any* spouse is subject to MCL 700.2801(2)(e)(i) if she is willfully absent for a year or more prior to his or her spouse's death. *Erwin Estate*, 503 Mich at 24. This Court should grant leave to appeal the Court of Appeals' decision or, alternatively, peremptorily reverse for the reasons stated by the Court of Appeals dissent.

IV. The Issues Before this Court are of Tremendous Legal Import

The at-issue statute, MCL 700.2801, states, in pertinent part:

> (2) For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:
>
> * * *
>
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (i) Was willfully absent from the decedent spouse.

MCL 700.2801(2)(e)(i). The Court of Appeals' decision improperly created a common law exception to this unambiguous statute, rendering it void when divorce proceedings are pending at the time of the deceased spouse's death. This is an important legal issue. As a published opinion, the Court of Appeals' decision will be binding on all Courts of Appeal and lower courts in the State of Michigan and will certainly impact any number of future probate and domestic cases.

As addressed in the Application for Leave to Appeal, the panel majority's ruling opens the door to gamesmanship, both in divorce proceedings and probate proceedings. Under Court of Appeals' decision, a spouse who has been willfully absent for years will be able to create

rights in a decedent spouse's estate simply by filing a complaint for divorce. Appellee erroneously implies that an abandoned spouse can avoid a surviving spouse from inheriting simply by, "executing a will." (Appellee Brief at 5). This is a gross misstatement of Michigan law. Under Michigan's Estates and Protected Individuals Code, a spouse may to elect to take against the will of her deceased spouse, thereby claiming an interest even in the face of a will that disinherits the surviving spouse. MCL 700.2202(2); *Erwin Estate*, 503 Mich at 5. Consequently, an abandoned spouse cannot protect his or her estate plan simply by, "executing a will" as Appellee suggests.

Again, the panel majority's ruling would allow willfully absent spouses to negate the estate planning wishes of abandoned spouses by simply filing a divorce action. Further, the panel majority's decision may result in the intentional delay of divorce proceedings if a surviving spouse believes he or she could receive more assets through a spousal share than through a divorce decree. These are all public policy issues that should be weighed and considered by the Legislature.

By creating law with such broad public policy implications in the context of this single matter, the Court of Appeals has established a rule of law that will certainly impact future matters across the State of Michigan in ways not intended by the panel majority. As noted, *supra*, public policy matters are left to the Legislature's discretion and are not the province of the courts. *Van*, 460 Mich at 327. This Court should grant leave to appeal to correct this issue or, in the alternative, peremptorily reverse the panel majority's decision and adopt the dissenting opinion.

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V. Appellee's Interpretation of the Facts is of No Consequence

Rather than address the undisputed fact that she had no physical or emotional contact with Decedent for more than a year prior to his death, Appellee offers interpretations of, or excuses for, that fact. (8/21/18 Transcript at pp 13, 29). However, Appellee's attempts to escape the record in this matter is of no consequence, as MCL 700.2801(2)(e)(i) unambiguously establishes a bright-line rule for abandonment, *without* exception. If that statute is to be rewritten to provide for an exception for divorcing couples, it is the Legislature that must address that public policy concern and decide to take action, not the Court of Appeals. *Mardigian Estate*, 502 Mich at 169.

VI. Conclusion

Appellee offers no legal or factual justification as to why this Court should not grant Appellants Appellant's Application for Leave to Appeal. Appellee cites no law to contradict the various legal arguments offered in Appellant's Application, choosing instead to simply rely upon an erroneous interpretation of this Court's decision in *Erwin Estate*. Appellee attempts to portray the statute at hand and ensuing issues as too granular for this Court. However, this Court found MCL 700.2801(2)(e)(i) was important enough to warrant leave to appeal less than two years ago in *Erwin Estate*, and the issues at hand were deemed significant enough to warrant a 2-1 *published* decision by the Court of Appeals. That split decision is now the law of the land and will remain so unless and until this Court corrects the errors of that appellate ruling. To not address the Court of Appeals' inappropriate creation of a common law exception to a statute will only encourage future courts to act similarly, invoking notions of fairness and other public policy considerations to justify the abrogation of unambiguous statutes. This Court has deemed such behavior impermissible, and should now enforce its consistent directives and make clear once

again that courts that seek to vary, modify or add to the plain language of statutes are acting outside of the bounds of the judiciary's function. *Mardigian Estate*, 502 Mich at 169. This Court should grant leave to appeal, or peremptorily reverse for the reasons set forth in the Court of Appeals dissent.

Respectfully Submitted,

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Dated: July 24, 2020